BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBORAH CHRIESTENSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 247,036
RUSSELL STOVER CANDIES	)	
Respondent	)	
AND	)	
	)	
HARTFORD ACCIDENT & INDEMNITY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the June 20, 2002 preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

ISSUES

This claim returns to the Board for the fourth time. A summary of this claim's history will help in understanding the issues on this appeal.

Claimant alleges she was exposed to fumes and odors while working for respondent in September and December 1998, which allegedly aggravated a preexisting condition of multiple chemical sensitivity. In one of the earlier appeals, the Board, in its Order dated September 29, 2000, reversed a preliminary hearing Order entered by Administrative Law Judge Brad E. Avery and found claimant had failed to prove that she had aggravated her alleged condition of multiple chemical sensitivity while working for respondent. But in that earlier order, the Board did find that claimant had established that she had exacerbated preexisting migraine headaches.

In February 2001, Judge Avery ordered respondent and its insurance carrier to provide claimant with medical care from Dr. William J. Rea of the Environmental Health Center in Dallas, Texas. Respondent and its insurance carrier then requested Judge Avery to terminate the treatment for claimant's migraine headaches, arguing that the ongoing headaches were not related to her alleged accident or exposure. Judge Avery, in an April

2001 Order, denied that request. Respondent and its insurance carrier appealed that denial to the Board, which found it did not have jurisdiction from a preliminary hearing order to review the issue of whether claimant's condition required ongoing medical treatment.

In August 2001, Judge Avery issued another order requiring respondent and its insurance carrier to provide claimant the therapy program prescribed by Dr. Rea. In March 2002, this claim was transferred from Judge Avery to Judge Frobish.

That brings us to the present appeal. Claimant requested a preliminary hearing, seeking the medical care prescribed by Dr. Rea. That hearing was held before Judge Frobish on June 17, 2002. Before presenting testimony at the hearing, claimant's attorney described the issue, as follows:

> The issue is the enforcement of the order of the Administrative Law Judge Avery requiring the insurance carrier to provide the treatment set forth by Dr. Rea; in other words, to pay and provide the prescriptions.

At the June 17, 2002 hearing, respondent and its insurance carrier opposed the treatment from Dr. Rea and introduced a medical report in support of their position from neurologist Dr. Jay S. Zwibelman, which challenged Dr. Rea's conclusions regarding claimant's condition and Dr. Rea's recommended treatment. Following the hearing, Judge Frobish entered the June 20, 2002 Order in which he found the increased migraine headaches that claimant had experienced after the exposures were only temporary. Accordingly, the Judge determined respondent and its insurance carrier were no longer required to provide claimant with medical treatment for her headaches.

Claimant contends Judge Frobish erred. First, claimant argues the Judge addressed issues not raised by the parties at the June 17, 2002 hearing as the hearing was requested to enforce earlier orders that required respondent and its insurance carrier to provide claimant with medical care to treat her migraine headaches. Claimant argues the June 17, 2002 hearing was transformed into a motion to terminate benefits and, accordingly, she did not have notice to prepare for that argument or the opportunity to present additional evidence regarding the compensability of this claim. Second, claimant argues the Judge made factual findings that are not based on the record and that the Judge, as a practical matter, reversed earlier decisions by the Board. Third, claimant argues that under the provisions of K.S.A. 44-534a claimant's previous award for medical benefits was not subject to modification until a full hearing on the claim.

Because of the above, claimant requests the Board to set aside the June 20, 2002 Order and remand this matter to the Judge to enforce the Board's September 29, 2000 Order in which the Board found claimant was entitled to medical care for the increased

migraine headaches that she had experienced following the September and December 1998 exposures to fumes and odors.

Conversely, respondent and its insurance carrier contend the June 20, 2002 Order should be affirmed.

The only issues before the Board on this review are:

1. Does claimant continue to experience increased migraine headaches due to the alleged September and December 1998 exposures to fumes?

2. If so, does claimant need medical care and treatment for the migraine headaches?

3. If so, is the medical treatment prescribed by Dr. William J. Rea reasonably necessary to treat claimant's migraine headaches?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

The June 20, 2002 preliminary hearing Order should be affirmed. Based upon the November 15, 2001 medical report of Dr. Jay S. Zwibelman, the Board concludes claimant's alleged ongoing headaches are not related to the exposures to fumes and odors in September and December 1998, while claimant was at work. Dr. Zwibelman stated, in part:

> IMPRESSION: I'm quite surprised as to the conclusions drawn by Dr. Rea. Deborah Chriestenson has a normal neurologic examination. She does not have toxic encephalopathy or positive Romberg's. She does not have autonomic dysfunction. She does not have underlying tissue damage. There's no basis for his conclusions as to inadequate oxygen utilization from cellular damage. It [sic] cells are damaged they regenerate. I took the liberty to contact Accu Chem Laboratories where the volatile panels were performed (1-800-451-0116). I spoke with the director of the laboratory, John L. Laseter Ph.D. I inquired of him the duration that these chemicals would remain elevated in the blood after exposure. He noted that the chemicals might be detectable for several hours or possibly days. While these chemicals may be fat soluble, they would not be around for more than a few weeks at the extreme most in an obese person who drank heavy alcohol. Simply put, this test performed over a year after the exposure would not reveal evidence of chemicals from the exposure. It is physically impossible. Dr. Rea's conclusions are not based upon evidence-based medicine. There's no basis for sauna detoxification. There's nothing to suggest that even if a volatile chemical were in the system that this would eliminate said chemical. There's nothing to suggest intravenous Vitamins, minerals and amino acids would have anything to do with

> promoting better health. Our gastrointestinal tract has a way of regulating food we take in to promote ideal health. There's nothing in medicine to suggest providing extra oxygen in any way promotes better health. There's nothing to suggest Deborah has organ system damage. Such damage would long ago have repaired itself. There is no medical basis for the skin testing to reveal a chemical sensitivity such as formaldehyde, chlorine or toluene. There is no basis to suggest a low level of CD8 suggest[s] immune dysregulation. It is absurd to think that a level of oxygen in her venous blood suggests that her tissue has hypoxia. There is no medical basis for this conclusion. While it is true Deborah Chriestenson has fibromyalgia and headaches, they have nothing to do with her brief chemical exposure. I do not believe the exposure to the floor wax has caused any ongoing problem or ongoing injury. Chemical exposure may cause stomach upset and headache, which would resolve in a few hours. Her current migraine problems are not related to the exposure of December 8, 1998. I do not agree with Dr. Rea's treatment plan. I do not feel it is based in evidence-based medicine. I do not feel any treatment is indicated as a result of the fume exposure from December 8, 1998 as I do not believe an injury occurred December 8, 1998. The left ulnar neuropathy at the elbow is not uncommon in the general population. This is related to putting pressure on the elbow. The exposure to the fumes played no role in the development of this problem. The fumes played no role in the development of her left rotator cuff sprain.
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> RECOMMENDATIONS: No treatment is indicated from the exposure of December 8, 1998. My previous recommendation of an inpatient pain program would be helpful. I do not feel the headache and myofascial pain was a result of any chemical exposure and not a work-related problem.

Accordingly, claimant's request for ongoing treatment from Dr. Rea is denied.

Claimant argues the June 17, 2002 hearing was improperly transformed into a proceeding to terminate benefits. The Board disagrees. The issue presented to the Judge was whether certain prescribed medical care was reasonably necessary to treat a condition attributable to a compensable work-related incident. In deciding that issue, the Judge was required to determine what medical condition the proposed medical treatment addressed and whether that medical condition was related to a compensable accident or occupational disease. Those are ongoing questions in all workers compensation claims in which an injured worker receives medical treatment. And when seeking an order for medical care from a judge, the injured worker has the burden to prove that the medical treatment being requested is for an injury or condition that is attributable to a work-related incident. Accordingly, claimant cannot claim surprise for being required to shoulder that burden.

Likewise, the argument that Judge Frobish exceeded his jurisdiction by determining that claimant's ongoing headaches were no longer attributable to the alleged exposures at work is also without merit. The question of whether an injured worker is receiving

reasonably necessary medical treatment for a work-related injury or condition is an issue that is properly addressed at a preliminary hearing.

Claimant also argues the June 17, 2002 hearing was requested to enforce a previous order entered by Judge Avery. As indicated above, when requesting medical treatment, workers have the burden of proving the relationship between the requested treatment and the work-related accident or disease. If claimant believes respondent and its insurance carrier have violated the provisions of the fraud and abuse statute by failing to comply with a judge's order, claimant's remedy is to report the alleged misconduct and request an investigation under that statute, K.S.A. 44-5,120. In the alternative, claimant could have obtained the medical treatment that had been ordered and then sought penalties for nonpayment of the charges.

Finally, the Board disagrees with claimant's argument that a judge may not modify an earlier preliminary hearing order. Preliminary hearings are summary in nature and are intended to address issues that arise in a claim before a worker reaches maximum medical improvement or other issues that are appropriately addressed before a final award is issued. The Board has long held that preliminary hearing orders may be modified as the evidence develops.

In short, Judge Frobish did not exceed his jurisdiction by entering the June 20, 2002 Order.

As provided by the Act, these preliminary hearing findings are not final but subject to modification upon a full hearing of the claim.[1]

WHEREFORE, the Board affirms the June 20, 2002 preliminary hearing Order.

IT IS SO ORDERED.

Dated this ____ day of September 2002.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Brenden W. Webb, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation

[1] K.S.A. 44-534a.